

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARIEL NICHOLAS DURR,

Defendant-Appellant.

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UNPUBLISHED

October 17, 2006

No. 269713

Grand Traverse Circuit Court

LC No. 04-009485-FH

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant pleaded guilty to carrying a concealed weapon (CCW), MCL 750.227, and possessing a controlled substance with the intent to manufacture or deliver an amount less than 50 grams, MCL 333.7401(2)(a)(iv). He was sentenced to consecutive prison terms of 23 months to 20 years on the controlled substance charge and one to five years on the weapons charge. This case is before us on remand from our Supreme Court for consideration as on leave granted. *People v Durr*, 474 Mich 1112; 712 NW2d 157 (2006). Defendant challenges the scoring of Offense Variables (OV) 1, 9, and 12, and claims he was denied the effective assistance of counsel because of his attorney's failure to object to the scoring of OV 1. We remand for resentencing.

Defendant first argues that he was incorrectly scored 25 points for OV 12 as to both his CCW and possession of a controlled substance convictions. We agree. To be scored 25 points for OV 12, "three or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42. The trial judge came to this score based on information from the presentence report stating that police found bullets that were most likely fired from the car in which defendant was sitting. These bullets were in all likelihood fired at three individuals who approached the car. The trial court has discretion in determining the number of points assigned so long as there is evidence in the record that adequately supports that score. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). However, there is no evidence that the bullets were fired by defendant and not by co-defendant. Further, there is no evidence the bullets were not fired in self-defense when the three individuals came upon the co-defendant's car.

For these same reasons, we agree with defendant that the trial court erred in scoring ten points for OV 9 as to both of defendant's convictions. Offense variable 9 is scored for the number of victims. Ten points are assigned when "there were 2 to 9 victims." MCL 777.39. In this case, there is no evidence that the gun was not fired in self-defense. If the gun had been

fired in self-defense then obviously the perpetrators of the attack would not be considered victims. Also, even if the three men who approached the car were fired at first, there is no evidence indicating that it was not the co-defendant who fired the gun. Since the trial court's error in scoring OV's 9 and 12 prejudiced defendant by resulting in OV scores that wrongfully increased defendant's minimum sentence range,<sup>1</sup> a resentencing must be ordered.

Defendant also argues that the trial court erred in scoring 25 points for OV 1, aggravated use of a weapon. However, since the scoring of OV 1 was not objected to at sentencing, we review this issue only for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). For this variable, MCL 777.31(2)(b) provides: "In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." Since defendant acknowledges in his brief that a co-defendant was scored 25 points for OV 1, the trial court followed the statute and thus did not commit plain error.

Lastly, defendant claims he was denied the effective assistance of counsel because his attorney did not object to the scoring of OV 1 at sentencing. To establish a claim of ineffective assistance of counsel defendant must show that counsel's performance fell below an objective standard of reasonableness and a reasonable probability that this performance harmed the defendant. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). In this case, because an objection to the scoring of OV 1 would have most likely been overruled based on the wording of the statute quoted above, counsel's failure to object to the scoring did not fall below an objective standard of reasonableness. Additionally, the only way an objection could have succeeded would have been to show that co-defendant had been improperly scored. Because there is no evidence in the record establishing the court's rationale in scoring the guidelines for co-defendant, defendant failed to meet his burden of developing the factual predicate for his claim of ineffective assistance. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001).

Remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Richard A. Bandstra  
/s/ Donald S. Owens

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<sup>1</sup> Defendant's CCW conviction constitutes a class E offense, MCL 777.16m, while his drug possession conviction constitutes a class D offense, MCL 777.13m. As scored by the trial court, defendant was given 60 OV points for the CCW offense and 75 OV points for the drug possession offense. This led to sentencing guideline ranges of 0-14 months for CCW, MCL 777.66, and 10-23 months for drug possession, MCL 777.65. Subtracting the incorrectly scored offense variable points for OV 9 and OV 12 would leave defendant with 25 OV points for the CCW offense, corresponding to a 0-9 month range, MCL 777.66, and 50 OV points for the drug possession offense, with a 5-23 month range.